Construction and General Laborers, Local Union No. 449, Connecticut Laborers District Council, Laborers International Union of North America, AFL-CIO *and* Modern Acoustics, Inc. and Local 210, United Brotherhood of Carpenters and Joiners of America, AFL-CIO

Local 210, United Brotherhood of Carpenters and Joiners of America, AFL-CIO *and* Modern Acoustics, Inc. and Construction and General Laborers, Local Union No. 449, Connecticut Laborers District Council, Laborers International Union of North America, AFL-CIO

Construction and General Laborers, Local Union No. 449, Connecticut Laborers District Council, Laborers International Union of North America, AFL-CIO *and* M. Gerber Construction Co., Inc. and Local 210, United Brotherhood of Carpenters and Joiners of America, AFL-CIO. Cases 39-CD-5, 39-CD-6, and 39-CD-7

March 12, 1982

DECISION AND DETERMINATION OF DISPUTES

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following charges filed by Modern Acoustics, Inc.,[1] hereinafter Modern, and M. Gerber Construction Co., Inc.,[2] hereinafter Gerber, alleging that Construction and General Laborers, Local Union No. 449, Connecticut Laborers District Council, Laborers International Union of North America, AFL-CIO,[3] hereinafter Laborers, and Local 210, United Brotherhood of Carpenters and Joiners of America, AFL-CIO,[4] hereinafter Carpenters, each violated Section 8(b)(4)(D) of the Act. Duly scheduled hearings were held before Hearing Officer Mary L. Davidson on March 21, 1981, in Case 39-CD-5; on April 17, 1981, in Case 39-CD-6; and on June 12, 1981, in Case 39-CD-7. The Laborers appeared at the March 21, 1981, hearing in Case 39-CD-5, the Carpenters appeared at the April 17, 1981, hearing in Case 39-CD-6, and the Laborers and Carpenters appeared at the June 12, 1981, hearing in Case 39-CD-7. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing upon the issues. Thereafter, Modern filed briefs in Cases 39-CD-5 and 39-CD-6, and Gerber and the Laborers filed briefs in Case 39-CD-7.

[1] Cases 39-CD-5 and 39-CD-6.
[2] Case 39-CD-7.
[3] Cases 39-CD-5 and 39-CD-7.
[4] Case 39-CD-6.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the rulings of the Hearing Officer and finds that they are free from prejudicial error. The rulings are hereby affirmed.

In its brief submitted in Cases 39-CD-5 and 39-CD-6, Modern requests that these cases be consolidated so as to avoid piecemeal litigation and unnecessary delay. We agree that Cases 39-CD-5 and 39-CD-6 should be consolidated for the reasons stated, and we also are of the opinion that Case 39-CD-7 should be consolidated therewith. Thus, the Unions involved are common to all three cases, and the work in dispute is fundamentally the same as well. We therefore consolidate Cases 39-CD-5,-6, and-7, so as to avoid a fragmented consideration of what are clearly interrelated issues.

Upon the entire record in this case, the Board makes the following findings:

1. THE BUSINESS OF THE EMPLOYERS

Modern, a Connecticut corporation with its principal place of business in Norwalk, Connecticut, is engaged in the installation of interior work, including acoustic tiles, interior walls, and carpentry. At all times material herein, Modern has been performing interior carpentry work at Stamford Town Center, Stamford, Connecticut, pursuant to a contract with Whiting Turner Construction Co., valued in excess of $100,000. During the past 12 months, Modern purchased and received goods valued in excess of $50,000, directly from suppliers located outside the State of Connecticut. During that same period, Modern performed services valued in excess of $100,000 for contractors who were themselves directly engaged in interstate commerce. The parties stipulated, and we find, that Modern is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

Gerber, a New York corporation with its principal place of business in New York, New York, is engaged in the installation of interior work, including interior walls and carpentry, and related work in the construction industry. At all times material herein, Gerber has been engaged in performing interior carpentry work at Bloomingdale's department store in Stamford, Connecticut, such work valued in excess of $50,000. During the past 6-month period, Gerber purchased goods and materials valued in excess of $50,000 which it received directly from suppliers located outside the State of Connecticut. During the same period, Gerber per-

formed services valued in excess of $50,000 for customers who are themselves directly engaged in interstate commerce. The parties stipulated, and we find, that Gerber is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that the Laborers and Carpenters are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts of the Dispute*

The Employers involved herein are each performing interior carpentry construction work, Modern working at the Stamford Town Center,[5] and Gerber performing the interior renovation of the Bloomingdale facility,[6] which is located approximately 200 yards west of the Town Center. At all times material herein, both Modern and Gerber have employed employees who are represented by the Carpenters, and both Employers have entered into collective-bargaining agreements with that Union. Neither Modern nor Gerber employs any employees who are represented by the Laborers. In general terms, the disputes herein concern whether individuals represented by the Carpenters, or whether individuals represented by the Laborers, are to transport, from the point of delivery to the site of actual construction, the materials[7] used by Modern and Gerber in their interior construction work.

The Employers herein assigned the work in dispute to their employees represented by the Carpenters. Subsequently, the Laborers submitted the dispute to the Impartial Jurisdictional Disputes Board, hereinafter IJDB, which, on April 10, 1981, issued an award [8] which states, in relevant part, that:

> Unloading, handling and distribution of substantial amounts of packed acoustical ceiling board to stockpile or stockpiles in the approximate area of installation on various floors as designated by the contractor shall be assigned to laborers. Handling from stockpile or stockpiles to point of installation shall be assigned to carpenters.

With respect to Case 39-CD-7, on May 7, 1981, the Laborers and Carpenters reached agreement under the auspices of the IJDB, which agreement states that:

> The unloading, handling and distribution of sheetrock from trailer trucks to stockpiles at the approximate point of installation as designated by the responsible contractor shall be assigned to laborers.

Such agreement also directed the contractor "to proceed with work on this basis." The record further reflects that all the parties herein have agreed to be bound by proceedings of the IJDB. Thus, Modern and Gerber each executed a collective-bargaining agreement with the Carpenters, which contract clearly states that,

> This agreement covers all employees performing carpenter work, coming under the work jurisdiction claims of the [Union], and by decisions and agreements of record rendered, affecting the building industry, by the National Joint Board for the Settlement of Jurisdictional Disputes affecting the building and construction industry. . . .
>
> In the interest of promoting industrial peace and harmony in the construction industry, the Employer agrees to cooperate in the settlement of jurisdictional disputes.[9]

Although the Laborers collective-bargaining agreement which appears in evidence does not refer to the IJDB, it is clear from the record that the Laborers participated in the adjudicatory process of the IJDB and considered itself bound thereby.[10]

B. *The Work in Dispute*

The work in dispute in Cases 39-CD-5 and 39-CD-6 involves the unloading and handling of equipment and materials necessary for Modern to install acoustical ceilings and metal stud and drywall construction at the J. C. Penney site located in the Stamford Town Center.

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[5] Modern Acoustics is the interior carpentry subcontractor at J. C. Penney, and the general contractor on the job is Whiting Turner Construction Co., Inc.

[6] Gerber is the interior carpentry subcontractor on the Bloomingdale job. The record does not reflect the identity, if any, of a general contractor on that job.

[7] The materials invoved in Cases 39-CD-5 and 39-CD-6 are acoustical tiles; Case 39-CD-7 involves sheetrock, studs, and tracks.

[8] This award applies to Cases 39-CD-5 and 39-CD-6.

[9] Art. 13, sec. 1. No party contends that the IJDB is not the valid successor of the National Joint Board.

[10] In addition, it is well settled that, in the absence of evidence to the contrary, the Board will take administrative notice of the fact that, as both the Laborers and Carpenters are members of the Building and Construction Trades Department, AFL-CIO, they are signatory to the agreement creating the IJDB and are bound to abide by its rules and procedures for the settlement of jurisdictional disputes. Finally, absent affirmative evidence that a labor organization has withdrawn from the BCTD, the Board presumes their continued membership. See *Local Union No. 70, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (F. W. Owens and Associates, Inc.)*, 205 NLRB 1171, 1173 (1973). It is thus clear that all parties were bound to an agreed-upon procedure at the time the unfair labor practice charges herein were filed, and thereafter.

The work in dispute in Case 39-CD-7 involves the unloading, handling, and distribution of sheetrock necessary for Gerber to perform remodeling work at Bloomingdale's department store site approximately 200 yards west of the Stamford Town Center.

C. *Contentions of the Parties*

The Laborers contends that the unloading and stockpiling of materials should be assigned to individuals represented by it based on area and industry practice, as well as on the basis of the April 10, 1981, IJDB award, and the May 7, 1981, IJDB-sponsored agreement.

The Carpenters contends that the work in dispute should be assigned to individuals represented by it based upon area and industry practice, as well as on its respective collective-bargaining agreements with the Employers herein.

Both Modern and Gerber have assigned the work in dispute to their respective employees represented by the Carpenters, and contend that such assignments should stand, based on past area and industry practice, economic considerations, and their respective collective-bargaining agreements with the Carpenters.

Insofar as the proceeding herein is concerned, the Laborers has consistently argued that the notice of hearing should be quashed, although its rationale in support of that position has been fluid. Thus, in Cases 39-CD-5 and 39-CD-6, the Laborers disclaimed the work in dispute. Nevertheless, the Laborers participated in the IJDB proceeding which culminated in the April 10, 1981, award which was arguably favorable to it. In Case 39-CD-7, the Laborers again moved that the notice of hearing in that case be quashed, but for the reason that the unions involved had entered into an agreement for the assignment of the work in dispute, under the auspices of the IJDB, and that by virtue of this agreement there no longer existed any issues to be resolved.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated.

The record in Case 39-CD-5 reflects that, subsequent to Modern's assignment of the work in dispute to its employees represented by the Carpenters,[11] and commencing during the last week in January 1981, and lasting into February, the Laborers engaged in strike activity with an object of securing the work in dispute for the individuals it represents.[12] The record further reflects, however, that the only companies employing individuals represented by the Laborers at that site are a masonry subcontractor, and Whiting Turner Construction Co., Inc., hereinafter Whiting Turner, the general contractor for the job.[13]

On March 18, 1981, the Carpenters business agent, John Cunningham, sent a letter to Modern[14] advising that the Carpenters would "continue to press its claim" for the work in dispute, and that "if your company removes such work from our members, or takes any action to prevent them from doing it, our members will strike or resort to such other economic measures as are necessary to uphold their rights." Thereafter, and as noted above, the IJDB, on April 10, 1981, issued an award as to the work in dispute herein.

At the Bloomingdale site, where Gerber was engaged in interior renovation work, Gerber had assigned the work of unloading and handling of sheetrock to its employees represented by the Carpenters. On or about May 15, 1981, Gerber's executive vice president, Jack Altes, spoke by telephone with a Mr. Deluca, a representative of the Laborers. They discussed the issue of who was to unload sheetrock, Deluca taking the position that the work should be assigned to employees represented by the Laborers, and Altes relating that John Cunningham of the Carpenters was taking the position that the unloading should be performed by employees represented by his Union. Deluca replied that unless the matter was resolved to his own satisfaction, the Laborers would go on strike and there would be picketing at Bloomingdale's the next day. Some days later the Laborers renewed the threat to picket, and on Friday, May 22, 1981, did actually picket the site, and laborers did not report to work.[15]

Based on the foregoing, and on the record as a whole, we find that an object of the Laborers threats and picketing in Cases 39-CD-5 and 39-

[11] As alluded to above, all of Modern's employees herein are represented by the Carpenters, and it employs no individuals represented by the Laborers.

[12] John Cunningham, the Carpenters general business representative, testified that the Laborers business agent stated that the Laborers were striking because the carpenters were doing laborers' work. This evidence was uncontroverted.

[13] On February 2, 1981, Whiting Turner sent a telegram to Modern, stating that Modern was in violation of its subcontract by its "failure to work in harmony with the other trades." Thereafter, on February 6, 1981, the Laborers, by letter to Whiting Turner, informed that company it was in violation of the collective-bargaining agreement which requires that all subcontractors doing Laborers work be covered by a Laborers collective-bargaining agreement. The letter concluded by stating that unless Whiting Turner instructed Modern to sign a contract with the Laborers, that it would proceed to arbitration.

[14] This evidence was proffered with respect to Case 39-CD-6.

[15] This evidence was proffered with respect to Case 39-CD-7.

CD-7, and that an object of the Carpenters threat in Case 39-CD-6, was to force or require the Employers herein to assign the disputed work to employees represented by their respective Unions. Therefore, with respect to each of the cases herein, we conclude that reasonable cause exists to believe that a violation of Section 8(b)(4)(D) of the Act has occurred.

As noted above, the Laborers at one time contended that the notices of hearing in Cases 39-CD-5 and 39-CD-6 should be quashed for the reason that it disclaimed the work in dispute. The record plainly shows, however, that the Laborers pursued its claim before the IJDB, and that the IJDB thereafter issued the April 10, 1981, document awarding the work, in part, to the Laborers. Based upon these facts, we find that the Laborers acted in a fashion inconsistent with its disclaimer, and that such disclaimer cannot, therefore, form the basis for quashing the notices of hearing in Cases 39-CD-5 and 39-CD-6.

We also find without merit the Laborers contention that the dispute in Case 39-CD-7 has been resolved by virtue of the May 7 agreement reached under the auspices of the IJDB. Thus, although the record reflects that the Carpenters and the Employers herein are contractually bound to submit such disputes to the IJDB, and that the Laborers participated in the proceedings of and agreed to the disposition of the IJDB, which resulted in an award and an agreement,[16] the evidence also shows that since June 1, 1981, the IJDB has been inoperative, has ceased hearing such disputes, and is not now a viable organization in a position to administer or police either the award or the agreement. In these circumstances, we do not view these dispositions as determinative of any of the cases now before us.[17] Accordingly, we hold that the disputes are properly before the Board for determination under Section 10(k) of the Act.[18]

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of the disputed work after giving due consideration to various relevant factors.

1. Employers' assignment and preference

Both Employers herein assigned the disputed work to their respective employees represented by the Carpenters. The record indicates that both Employers maintain a preference for this assignment; and, in the case of Gerber, the record also shows that it has generally been Gerber's past practice to assign the work in dispute herein to its employees represented by the Carpenters. These factors support an award of the work to the Carpenters-represented employees of both Employers herein.

2. Work and skills involved

As discussed above, the work herein involves the unloading, handling, and distribution of packed acoustical ceiling board,[19] and sheetrock,[20] from the point of delivery to the areas where the actual interior carpentry is being performed. The record reflects that both types of materials are relatively fragile and are susceptible to being damaged if not handled carefully. Although the Carpenters argues that the individuals performing the actual construction work,[21] and who therefore utilize these materials, would be more likely to handle such materials with greater care, we note that none of the parties presented evidence, statistical or otherwise, reflective of the degree of damage inflicted by employees performing such work and represented by either Union. Accordingly, we find the Carpenters contention with respect to this factor to be speculative, and inconclusive as to affecting our determination herein.

3. Collective-bargaining agreements

At all material times, the Carpenters and the Employers herein have been signatory to the collective-bargaining agreement between the Independent Contractors in western Connecticut and that union. That contract specifies that employees represented by the Carpenters shall perform the "handling and distribution of sheetrock from point of

[16] The award relates to Cases 39-CD-5 and 39-CD-6; the agreement relates to 39-CD-7.

[17] See, generally, *Millwrights Local Union No. 1862, United Brotherhood of Carpenters and Joiners of America (Jelco, Inc.)*, 184 NLRB 547, 548 (1970), wherein the predecessor of the IJDB, the National Joint Board, ceased operation subsequent to the issuance of an award.

Our dissenting colleague argues that we should withdraw from disputes which have been adjudicated regardless of whether the IJDB exists to police or administer its awards. He further posits that there is no indication in these cases that the parties have not abided, or will not abide, by these awards, noting also that none of them has sought to involve either the review or policing mechanisms of the IJDB. First, the adjudication of a dispute which cannot be enforced does not further a dispute's resolution or promote industrial stability. That is the situation we face in the instant matters. Second, since the parties continued to press for a resolution of the dispute before us in spite of the IJDB's actions, and the last hearing of these cases occurred after the dissolution of the IJDB, the parties themselves have indicated that they consider the dispute to be unresolved and ongoing. Accordingly, we would be remiss in our statutory duties if we did not, under the circumstances here, find that the inoperative status of the IJDB made its outstanding awards useless as a means of adjusting the parties' work dispute.

[18] See, generally, *Millwrights Local union No. 1862 (Jelco, Inc.), supra*; and *Local No. 42, Laborers International Union of North America, AFL-CIO (R. B. Cleveland Company)*, 184 NLRB 686 (1970).

[19] Cases 39-CD-5 and 39-CD-6.

[20] Case 39-CD-7.

[21] Such individuals would be employees represented by the Carpenters.

delivery,"[22] as well as "the unloading [and] distribution of hardwood flooring, rugs, floor tile, metal partitions, acoustic tile trim and runners, roofing and siding. . . ."[23]

The Laborers also provided a copy of its contract with the Associated General Contractors of Connecticut. The record reflects, however, that neither of the Employers herein is signatory to such contract. The record further shows that the general contractor at the J. C. Penney site, Whiting Turner, is signatory to this agreement,[24] and that it employs individuals represented by the Laborers. The record does not reflect, however, the identity of the general contractor, if any, at the Bloomingdale site, or whether there is a collective-bargaining agreement extant between the Laborers and that general contractor.[25] The Laborers contract claims "unloading, handling and distributing of all materials . . . from the point of delivery to stockpiles and from stockpiles to approximate point of installation."[26]

With respect to the situation in Cases 39-CD-5 and 39-CD-6, the record reflects that the Laborers initially sought to enforce its claim to the work in dispute by virtue of article II, section 7 of its collective-bargaining agreement, which states, in relevant part, that "the Employer [Whiting Turner] further agrees to refrain from doing business with any subcontractor for work to be done at the site of a construction project covered by this Agreement, except where such contractor subscribed and agrees in writing to be bound by this Agreement and complies with all the terms and conditions of this agreement." There is evidence that the Laborers sought, through arbitration, to enforce this clause with respect to Whiting Turner's subcontract with Modern, but the record does not indicate whether any such proceeding took place.

As is apparent from a review of the collective-bargaining agreements, each Union has defined its own trade jurisdiction to cover the work in dispute,[27] so that the collective-bargaining agreements, on their face, do not favor an award of the work to individuals represented by one Union or the other. What is of significance, however, is that the Employers herein, the entities with the authority to assign the work, do not employ any employees represented by the Laborers nor have they entered into any collective-bargaining agreement with that Union. Indeed, as alluded to above, the Laborers only contractual claim to the work in dispute arises by virtue of a clause requiring, in essence, the general contractor to "police" the trade jurisdiction decisions of its subcontractors.[28] Accordingly, and based upon all of the above, we find that the only collective-bargaining agreement with any applicability to the disputes herein is that in existence between the Employers and the Carpenters, and which we therefore find favors an award of the work in dispute to employees represented by that union.

4. Efficiency and economy of operations

As noted above, neither Modern nor Gerber employs any employee represented by the Laborers. Thus, in order for Laborers-represented individuals to perform the work in dispute, it would be necessary for the Employers to hire such individuals on an *ad hoc* basis for those times when delivery of materials would be expected at the jobsite. This would present a number of potential difficulties: thus, the delivery truck would have to arrive on schedule so as to minimize downtime, and, if the truck did not arrive, the Laborers contract would require "Reporting Time Pay" even though no work would have been performed. The other option would be for the Employers to utilize Laborers-represented employees employed by the general contractor, and then be backcharged by the general contractor for the use of those employees. The record does not reflect whether, in a backcharge situation, the Employers would be subject to the "Reporting Time Pay" contractual provisions in the event of nondelivery; but it seems logical to assume that, at the very least, the Employers' utilization of the general contractor's labor force would be subject to its availability, and would thus be at the sufferance of the general contractor. We emphasize in this regard that the record in Case 39-CD-7 does not reflect whether there is a general contractor at the Bloomingdale site, and whether it employs employees represented by the Laborers.

As to the current arrangement, the Employers assign as many employees represented by the Carpenters as are necessary to unload a particular truck at a given time. Thus, the unloading conditions are not unchanging, and the number of indi-

[22] Art. 13, "Trade Jurisdiction," sec. 1.

[23] *Id.* at sec. 4.

[24] Cases 39-CD-5 and 39-CD-6.

[25] Case 39-CD-7.

[26] Appendix "A," "*TENDERS*." This section defines "Tending" as the "preparation of materials and the handling and conveying of materials to be used by mechanics of other crafts."

[27] The Carpenters contract, as set out above, refers to "acoustic tile trim," rather than to the acoustic tile mentioned in the stipulated disputed work. No party, however, has taken issue with this apparent discrepancy, nor is there any record evidence that the "acoustic tile" discussed in the record is significantly distinguishable from "acoustic tile trim."

[28] We express no opinion as to whether such clause is lawful within the meaning of Sec. 8(e) of the Act, and reiterate that there is no indication in the record in Case 39-CD-7, as to whether the Laborers has a collective-bargaining agreement with any company performing work at the Bloomingdale site.

viduals assigned would depend on the size of the shipment, the traffic at the loading dock, and the urgency of need for the materials to be unloaded. In sum, assigning the work to their own employees allows the Employers maximum flexibility both as to number of employees assigned and the duration of assignment.

Accordingly, we find, based on all of the above, that the factor of efficiency and economy of operations favors an award of the work in dispute to employees represented by the Carpenters.

5. Industry and area practice

The record herein clearly reflects a mixed practice both as to the industry, and as to the area, of southern Connecticut. Accordingly, a consideration of these factors does not favor an award of the work in dispute to individuals represented by either the Carpenters or the Laborers.

6. Awards by Impartial Jurisdictional Disputes Board

In addition to the April 10 award, and the May 7 agreement, a number of IJDB decisions were placed in evidence during the course of the hearings in these cases. Some of these other decisions considered comparable or identical work to that now in dispute. All of these awards, however, applied only to the job in question and are thus not applicable herein;[29] and, as discussed at length, *supra*, the IJDB is not now operative, adding to the questionable status of the precedential value of these decisions.

With respect to the April 10, 1981, IJDB award of the disputed work, as well as the May 7, 1981, agreement under the auspices of the IJDB, we are of the opinion that neither disposition should be given controlling weight herein.[30] Thus, the record does not indicate what evidence was presented in the proceeding which formed the basis for the award or the agreement. In addition, neither document indicates what evidence formed the basis therefor, and only states that it was predicated upon "particular facts and evidence before it regarding this dispute . . . ." Since neither the award nor the agreement offers any explanation as to what facts and evidence each relied upon, we are unable to evaluate the dispositions according to our own standards to determine the degree of deference to which each might be entitled.

Accordingly, upon consideration of this factor, we find that the evidence before us does not favor an award of the work in dispute to individuals represented by either Union.

Conclusions

Upon the record as a whole, and after full consideration of all relevant factors involved, we believe that the employees of the Employers who are currently represented by the Carpenters, rather than individuals represented by the Laborers, should be assigned the work in dispute. We reach this conclusion relying upon the Employers' assignment of the disputed work to its own employees,[31] the current collective-bargaining agreements,[32] the fact the employees represented by the Carpenters possess the requisite skills to perform the work, and that such an assignment will promote efficiency and economy of operations. Accordingly, we shall determine the disputes before us by awarding the work of unloading and handling of equipment and materials necessary for Modern to install acoustical ceilings and metal stud and drywall construction[33] at the J. C. Penney Stamford Town Plaza jobsite, and the unloading, handling and distribution of sheetrock[34] at the Bloomingdale jobsite, to employees represented by the Carpenters, but not to this Union or its members.[35]

DETERMINATION OF DISPUTES

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board hereby makes the following determination of disputes:

1. Employees of Modern Acoustics, Inc., who are currently represented by Local 210, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, are entitled to perform the work of unloading and handling of equipment and materials necessary for Modern to install acoustical ceilings and metal stud and drywall construction at the J. C. Penney, Stamford Town Plaza jobsite, in Stamford, Connecticut.

[29] It should also be noted that none of the IJDB awards in evidence reflect whether, unlike the situation herein, the Employer had collective-bargaining agreements with both of the Unions involved.

[30] Although, as discussed above, we do not find either the award or the agreement to be sufficient bases to quash the notices of hearing by virtue of the hiatus in IJDB operations, it is nonetheless necessary to consider whether such IJDB dispositions have any precedential value for our substantive inquiry concerning an award of the work in dispute.

[31] We also rely on evidence as to Gerber's past practice of assigning such work to its employees represented by the Carpenters.

[32] As discussed above, the Employers herein do not have collective-bargaining agreements with the Laborers.

[33] Cases 39–CD–5 and 39–CD–6.

[34] Case 39–CD–7.

[35] The record does not support a countywide award as requested by Modern. Accordingly, the present determination is limited to the work in controversy being performed by the Employers at the J. C. Penney's Stamford Town Plaza site and the Bloomingdale's site, respectively.

2. Employees of M. Gerber Construction Co., Inc., who are currently represented by Local 210, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, are entitled to perform the work of unloading, handling, and distribution of sheetrock necessary for Gerber to perform remodeling work at the Bloomingdale jobsite in Stamford, Connecticut.

3. Construction and General Laborers, Local No. 449, Connecticut Laborers District Council, Laborers International Union of North America, AFL-CIO, is not entitled, by means proscribed by Section 8(b)(4)(D) of the Act, to force or require Modern Acoustics, Inc., to assign the work described in paragraph 1, above, or to force or require M. Gerber Construction Co., Inc., to perform the work described in paragraph 2, above, to individuals represented by that labor organization.

5. Within 10 days from the date of this Decision and Determination of Disputes, Construction and General Laborers, Local No. 449, Connecticut Laborers District Council, Laborers International Union of North America, AFL-CIO, shall notify the Officer-in-Charge for Subregion 39, in writing, whether or not it will refrain from forcing or requiring Modern Acoustics, Inc., and M. Gerber Construction Co., Inc., the Employers herein, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the work in dispute to individuals represented by Local 449, rather than to employees represented by Local 210, United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

MEMBER FANNING, dissenting:

Contrary to my colleagues, I would not determine these disputes and would quash the notices of hearing herein. Thus, as recognized by the majority, the IJDB issued an award of the work in dispute with respect to Cases 39-CD-5 and 39-CD-6; and, with respect to Case 39-CD-7, an agreement was reached by the contesting Unions, under the auspices of the IJDB, resolving the issue of which individuals should perform the work in dispute therein.

Although the Carpenters and the Employers have, at various points throughout these proceedings, stated that they do not consider themselves bound by the IJDB, the record is clear that the Employers and the Carpenters are contractually bound to abide by the dispute-settling mechanism of the IJDB. The Laborers, as members of the Building and Construction Trades Department of the AFL-CIO, is likewise bound, and has throughout this proceeding invoked the IJDB dispute-settling mechanism and stated its willingness to abide thereby.

It is, therefore, clear that the methods for voluntary adjustment of which Section 10(k) of the Act speaks were agreed to by all parties herein; and despite the protestations of the Employers and the Carpenters, it has long ago been decided that a party which binds itself to the dispute-settling process of the IJDB cannot disengage itself therefrom in the hopes of invoking this Board's determination of the dispute. Thus, Section 10(k) of the Act requires *only* a showing that there exists a method of voluntary adjustment of the dispute, and, consequently, *no* corollary requirement that the parties must also show that such method will be activated and will, in fact, resolve the dispute. See, generally, *United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union No. 447, AFL-CIO (Capitol Air Conditioning, Inc.)*, 224 NLRB 985, 988 (1976).

The only issue before us, then, and given the facts herein, is whether the present hiatus in the operation of the IJDB requires the Board to override an IJDB award of, and an IJDB agreement as to, the work in dispute. In my view, the National Labor Relations Act clearly requires us to withdraw from disputes which have already been adjudicated, as, indeed, is the case herein. My colleagues, however, argue that the IJDB is not now a viable organization in a position to administer or police either the award or the agreement. This is beside the point. Thus, the award and the agreement were a *fait accompli* prior to the hiatus in IJDB operations, and there is no record evidence that any party herein, at any time, sought to invoke either the review or policing mechanisms of the IJDB, or in any way claims that its due process rights are somehow circumscribed by this hiatus.

Thus, for example, the record reflects that on May 11, 1981, James E. Davis, assistant to the general president of the Carpenters International union, forwarded instructions to the local union involved herein as to how the IJDB agreement was to be implemented. Nor has there been any subsequent indication that any party has acted in derogation of either the award or the agreement. For the Board to *now* decree that these dispositions have no force and effect because some party *might* at some time in the future fail to abide by these dispositions and therefore *might* request review or the policing thereof, is to concern ourselves with contingencies that may never occur. What is, however, most disheartening to me is that the majority decision will effectively disrupt resolutions that were apparently workable ones, and, which, given the rigors of industrial life, were more than likely reached with no small degree of effort. By the majority's action

herein, this Board will only deter any future attempts by other unions and employers to settle their differences, because they will now know that this Board does not believe them capable of resolving such problems on their own. Finally, by denying resolutions such as the ones herein the deference they deserve, we encourage "holdouts"—parties who will refuse to reach agreement or abide by IJDB awards because they hope to receive more favorable treatment from us. This does not aid in the speedy resolution of jurisdictional disputes, and also serves to undermine the instruction of Section 10(k) of the Act, which empowers us to hear and determine such disputes *unless* there is evidence that the parties have adjusted them, or have an agreed-upon method for their adjustment. This record clearly reflects that both these conditions have been met.

In view of the clear congressional policy to encourage the voluntary adjustment of jurisdictional disputes, I would adhere to this Board's policy of insisting that parties who have such an agreed-upon method be required to resolve their disputes through that method and honor decisions arrived at thereunder. Accordingly, I would quash these notices of hearing.[36]

[36] See, generally, my dissent in *Millwrights Local Union No. 1862 (Jelco, Inc.)*, 184 NLRB 547, 549 (1970).